

## **4. LEGAL DISCUSSION**

IMBEWU Enviro-Legal Specialists (Pty) Ltd was appointed by Bohlweki Environmental (Pty) Ltd, to provide certain environmental legal assistance, at the Scoping phase of an environmental impact assessment (EIA), in connection with the proposed establishment, by Eskom, of a Concentrating Solar Power (CSP) Plant and associated infrastructure, at one of three identified sites in the Northern Cape Province (the project). Eskom has contracted Bohlweki, as an independent consultant, to undertake the required EIA processes on its behalf.

It is appropriate to conduct an environmental legal analysis within the context of an EIA because the relevant South African legal regime requires that the consultant undertaking the process, on behalf of the applicant for the environmental authorisation, should have a working knowledge of all relevant policies, legislation, guidelines, norms and standards. Included in IMBEWU's scope of work is the requirement to provide an environmental legal report dealing with a range of relevant issues, including:

- the South African legal regime for EIA; and
- matters relating to potential consents and authorisations that may be required for the establishment of the project.

IMBEWU's first report dealing with the above matters at a preliminary level was included in the Environmental Scoping Report (chapter 4 of the ESR) which was submitted to DEAT in August 2006. This report updates the first report in light of certain factors explained below and should be regarded simply as an extension of the first report. This report must, therefore, be read with Chapter 4 of the Environmental Scoping Report in order to gain a comprehensive understanding of the matters considered by both reports, and of certain limitations of the reports.

### **4.1. Content of this report and how it differs from the first report**

#### ***4.1.1. The general content of the first report***

The first report noted that activities associated with the project:

- have the potential to trigger the South African requirements for EIA; and,
- are likely to require a number of particular consents and authorisations for their operation.

The response to the question of whether a proposed activity triggers the EIA requirement is determined by considering the specific actions required to perform the proposed activity. The response to the question of which consents and authorisations may be required to undertake the proposed activity is determined

by considering both the specific actions required to perform the proposed activity and the geographical location at which the proposed activity will be performed.

With these factors in mind, for the purposes of drafting the first report and by way of instruction on the physical parameters of the project, Bohlweki provided IMBEWU with a Briefing Paper on the project, dated March 2006, which includes limited environmental, technical and geographical information. To enhance its understanding of the project IMBEWU conducted telephonic consultations with Bohlweki in order to interrogate certain of the environmental, technical and geographical information contained in the Briefing Paper. Included in the Briefing Paper, is a brief description of the general premise for the project, the future operation of the CSP plant and information on three candidate sites that had been identified as potentially feasible locations for the establishment of the project, namely:

- Olyvenhoutsdrift;
- Bokpoort; and
- Tampansrus.

Based on its abovementioned instructions, agreement with Bohlweki on the required scope of work and its experience in these matters, IMBEWU addressed the following two broad areas in the first report:

- The question of the need for EIA prior to the undertaking of the project, including a description of the relevant South African EIA legal regime, i.e., that flowing from the requirements of the Environment Conservation Act No. 73 of 1989 (ECA) and associated regulations, and a comparative analysis of this regime with that prescribed for “environmental assessment”, by the World Bank. The comparative analysis was undertaken in response to Eskom’s request that an international perspective be included in the environmental legal reporting associated with the project. The comparative analysis is presented in table format, in Table 4.1 of the first report included once again for easy reference (see Table 4.1).
- Potentially applicable environmental legal provisions (at a first phase level), drawn from a range of national and provincial legislation that may be relevant to the establishment of the project. It should be noted that due to the fact that, at the time of drafting of the first report, the final decision on the location of the project had not been made, the first report does not consider potentially applicable municipal by-law. The abovementioned information on the potentially applicable environmental legislation is also presented in table format, namely on Table 2 of the first report. Include in Appendix D for easy reference.

<b>TABLE 4.1:                      COMPARATIVE ANALYSIS OF THE CURRENT SOUTH AFRICAN REQUIREMENTS FOR ENVIRONMENTAL IMPACT ASSESSMENT                      AND THE WORLD BANK GUIDELINES FOR ENVIRONMENTAL ASSESSMENT</b>	
<b>SOUTH AFRICAN ENVIRONMENTAL IMPACT                      ASSESSMENT (EIA) REQUIREMENTS</b>	<b>WORLD BANK ENVIRONMENTAL                      ASSESSMENT (EA) REQUIREMENTS</b>
<b>Introduction</b>	
<p>[Note: so as not to burden this discussion only the EIA regime determined by the Environment Conservation Act (107/1997) (ECA) and the so-called "EIA" Regulations has been considered in Table One].</p> <p>The objectives of the EIA provisions of the ECA are <i>inter alia</i>:                      to ensure that the environmental effects of activities are taken into consideration before decisions in this regard are taken; and,                      to ensure public involvement in the undertaking of identified activities. (DEAT Guide, p. 9)</p> <p>The EIA process should be applied as early in the proposed activity's planning stages as practicable and before irrevocable decisions are made, in order to ensure that environmental considerations are incorporated proactively into decisions taken. (DEAT Guide, p. 9)</p>	<p>The focus of EA is:</p> <p>To evaluate a project's potential environmental risks and impacts in its area of influence. The World Bank (WB) favours preventive measures over mitigatory or compensatory measures, whenever feasible.</p> <p>To consider natural and social aspects in an integrated way.</p> <p>EA considers: Variations in project and country conditions, findings of country environmental studies, national policy framework &amp; legislation, and institutional capabilities related to the environment and social aspects. (OP 4.01, par. 2&amp;3)</p> <p>EA should be initiated as early as possible in project processing and is integrated closely with the economic, financial, institutional, social, and technical analyses of a proposed project. (OP 4.01, par. 3)</p> <p>Both OP 4.01 and BP 4.01 refer to assistance being given to the project proponent by staff of the WB.</p>

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	BP 4.01 deals, in particular, with WB internal documentation that must be completed for WB environmental assessment.
<b>Categorisation of Projects</b>	
ECA: Reg. 1182: Project activities falling into a clearly defined list require an EIA.	<p>There are three main categories of projects, namely A, B and C.</p> <p>Category A projects are “likely to have significant adverse environmental impacts that are sensitive, diverse or unprecedented. These impacts may affect an area broader than the site or facilities subject to physical works”. (OP 4.01, par. 8(a)).</p> <p>EIA, as opposed to EA, is normally required for Category A projects. EIA is defined as “an instrument to identify and assess the potential environmental impacts of a proposed project, evaluate alternatives, and design appropriate mitigation, management, and monitoring measures”. (OP 4.01).</p> <p>An <i>environmental management plan</i> is an integral part of EA for Category A projects. Such a plan is defined as “an instrument that details (a) the measures to be taken during the implementation and operation of a project to eliminate or offset adverse environmental impacts, or to reduce them to acceptable levels; and (b) the actions needed to implement these measures”. (OP 4.01)</p>

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<b>Process General Outline</b>	
<p><b>The following are the main stages in the ECA process:</b></p> <p>The appointment by the applicant of an independent consultant who must comply with the regulations on behalf of the applicant.</p> <p>Pre-application consultation with the relevant authority.</p> <p>The submission of applications on the prescribed form to the relevant authority.</p> <p>Plan of Study for Scoping</p> <p>Draft Scoping Report for public comment.</p> <p>Final Scoping report incorporating public comment submitted to the relevant authority.</p> <p>If the relevant authority decides that the Scoping Report needs to be supplemented, a plan of study for an environmental impact assessment must be submitted.</p> <p>After acceptance of the plan of study for the environmental impact assessment, the applicant must prepare an environmental impact report ("EIR").</p>	<p><b>The following are the main stages in the World Bank environmental assessment process (Pollution Prevention and Abatement Handbook, pages 25-29):</b></p> <p>Stage 1: <u>Screening</u>. This stage determines the nature and extent of the EA to be conducted. Screening occurs at the time that the project is identified, and determines the nature and magnitude of the proposed project's potential environmental and social impacts, and assigns the project to a category.</p> <p>Stage 2: <u>Scoping and Terms of Reference Development</u>: Once a project is identified a scoping is undertaken to identify key issues and develop Terms of Reference for the EA.</p>

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<p>Draft EIR issued for public comment.</p> <p>Final EIR, incorporating and responding to public comment, submitted to the relevant authority for decision making.</p> <p>The competent authority will then consider the application and refuse the application or issue an authorization, with or without conditions, and must issue a written Record of Decision (RoD).</p> <p>The 'no-go' option can be considered, and is within the discretion of the authorising authority.</p>	<p>Stage 3: <u>Preparing the Environmental Impact Assessment Report</u></p> <p>The World Bank <i>Pollution Prevention and Abatement Handbook</i> describes pollution prevention and abatement and emission levels acceptable to the WB. However, the EA process may result in alternative recommended levels, taking into account local conditions and national legislation. The EA report must provide full and detailed justification for the levels and approaches chosen for a particular project. (OP 4.01, par. 6).</p> <p>The "without project" scenario is a feasible alternative to implementing the project. (OP 4.01, par. 8(a))</p>
<b>Responsibilities of various Parties</b>	
<p>The applicant is responsible for complying with the requirements of the EIA regulations.</p>	<p>The WB requires the borrower to carry out EA. (OP 4.01, par. 4)</p>

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<p><b>Independent Consultants:</b> The Applicant must appoint an independent consultant and to ensure that the consultant has:</p> <p>Expertise in the area of environmental concern being dealt with;</p> <p>The ability to manage public participation processes, and to produce thorough and informative reports, and access to adequate systems to preserve data;</p> <p>A good working knowledge of relevant environmental impact management, policies, legislation, guidelines and norms and standards.</p>	<p><b>Independent Consultants:</b> The responsible party:</p> <p>Retains independent EA experts, not affiliated with the project to carry out the EA.</p> <p>For Category A projects that are highly risky or that involve serious multidimensional environmental concerns, an “advisory panel” of independent, internationally recognised environmental specialists should also be engaged, to advise on all aspects of the project relevant to the EA.</p> <p><i>The advisory panel advises on: (a) the terms of reference for EA; (b) key issues and methods for preparing the EA; (c) recommendations and findings of the EA; (d) implementation of the EA’s recommendations; and (e) development of environmental management capacity. (OP 4.01, par.4 and footnote 7).</i></p>
<p><b>Other responsibilities of the Applicant include:</b></p> <p>To be responsible for all processes, information, plans and reports</p>	

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<p>produced in complying with the EIA Regulations.</p> <p>To ensure that the consultant has no financial or other interest in the undertaking of the project, except from complying with the requirements of the Regulations, and to ensure that the independent consultant provides the relevant authority access to all pertinent information.</p> <p>To be responsible for all costs incurred in complying with the Regulations.</p> <p>To be responsible for the public participation process, and to indemnify the government from any liability arising out of the content of any report, procedure or action for which the applicant or the consultant(s) is responsible for in terms of the Regulations.</p> <p><b>The Independent Consultant</b> has a series of concomitant obligations, save for being responsible for all costs incurred in complying with the regulations.</p> <p><b>Interested Parties</b> are responsible to provide input and comment during various stages of the EIA process.</p>	
<b>Public Consultation</b>	
<p>It is recommended that the input and comments of interested parties be obtained during the following stages (DEAT Guidelines, page 15):</p>	<p>During the EA process project-affected groups and local NGOs are consulted about the project's environmental aspects and considers view.</p>



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<p>Scoping – identify the issues and alternatives to be considered.</p> <p>Assessing and mitigating impacts</p> <p>Review of EIR</p> <p>Implementation and monitoring.</p>	<p>Such consultations should be initiated as early as possible. (OP 4.01, par. 15).</p> <p>For Category A projects these groups must be consulted at least twice: Shortly after environmental screening and before the terms of reference for the EA are finalised.</p> <p>Once a draft EA report is prepared.</p> <p>In addition these groups are consulted throughout project implementation as necessary to address EA-related issues that affect them.</p>
<b>Disclosure</b>	
<p>The ethos of the South African EIA process is that relevant information pertaining to the particular activity should be revealed during the EIA process.</p>	<p>For meaningful consultations relevant material must be provided in a timely manner prior to consultation in a form and language that are understandable and accessible to the groups being consulted.</p>
<p>The Promotion of Access to Information Act (No. 2 of 2000) and the Promotion of Administrative Justice Act (No. 3 of 2000) also require that full disclosure be made in these instances.</p>	<p>For Category A projects: A summary of the proposed project's objectives, description and potential impacts are provided for the initial consultation.</p>

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	<p>A summary of the draft EA report's conclusions are provided for the consultation after preparation of the draft EA report.</p> <p>The draft EA report must also be made available at a public place accessible to project-affected groups and local NGOs..</p>
<b>Contents of Final Reports</b>	
<p>An EIR must contain at least the following (DEAT Guideline, page 27-29):</p> <p>Description of each feasible alternative</p> <p>Assessment of impacts</p> <p>Nature: extent, duration, intensity, probability</p> <p>Determination of significance</p> <p>Mitigation</p>	<p>Content of an EA Report for a Category A Project (as per OP 4.01, Annex B, for convenience included hereunder as Appendix B):</p> <p>Executive Summary</p> <p>Policy, legal and administrative Framework</p> <p>Project Description</p> <p>Baseline Data</p> <p>Environmental Impacts</p>
<p>Addressing of key issues</p> <p>Comparative assessment of feasible alternatives</p>	<p>Analysis of alternatives</p> <p>EMP – covers mitigation measures, monitoring and institutional strengthening.</p>

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<p>Appendices containing descriptions of:</p> <ul style="list-style-type: none"> <li>the environment concerned;</li> <li>the activity to be undertaken;</li> <li>the public participation process followed including a list of interested parties and their comments;</li> <li>media coverage given to the proposed activity;</li> <li>other information included in the accepted Plan of Study.</li> </ul>	<p>Appendices:</p> <ul style="list-style-type: none"> <li>list of EA report preparers – individuals and organizations;</li> <li>references – written material both published and unpublished used in the study preparation;</li> <li>record of interagency and consultation meetings;</li> <li>tables representing relevant data;</li> <li>list of associated reports.</li> </ul>

#### **4.1.2 The general content of this report**

Certain relevant developments have occurred in the time since the delivery, to Bohlweki, of the first report. The most important of these, from the perspective of this report are:

- Recent developments in South African environmental law, in particular the promulgation of regulations, in terms of the National Environmental Management Act No. 107 of 1998 (as amended) (NEMA), underpinning an amended EIA regime. This factor now permits an assessment of the relevance of such amended regime to the EIA processes already underway in respect of the project.
- The determination of the specific location for the project, namely Olyvenhoutsdrift, which now permits a consideration of the relevance of municipal by-law to the project.

Both of the above factors were addressed in the drafting of this report. In addition certain new instructions, provided to IMBEWU by Bohlweki, in regard to matters related to aviation are dealt with in this report. The structure of this report is described immediately below and explained in more detail in section 2, following. The remainder of this report comprises the following sections:

- Section 4.2: Scope and limitations of this report.
- Section 4.3: The amended NEMA EIA regime.
- Section 4.4: Key international, national, provincial and municipal, convention, legislation and by-law potentially applicable to the establishment of the proposed Concentrating Solar Power Plant.

#### **4.2. Scope and Limitations of this Report**

##### **4.2.1. The amended NEMA EIA Regime**

*Please refer to section 4.3 of the first report for the context for this sub-section.*

As mentioned in section 4.3 of the first report, the South African situation with regard to EIA, at the time of drafting the first report, was complex. In essence two, mutually exclusive EIA regimes were operational at that time, namely that provided for by the ECA and associated regulations (the previous EIA regulations) and that provided for by the amended NEMA. However, at the time the regulations required to operationalise the amended NEMA EIA regime had not been promulgated, although various drafts of such regulations were available as guidance for what to expect when they were finally promulgated. Since the time of drafting of the first report such regulations have been promulgated and are

named the Environmental Impact Assessment Regulations, 2006 (the new EIA regulations).<sup>1</sup> The new EIA regulations *inter alia* repeal the previous EIA regulations but make specific provision for dealing with EIA processes underway as at the date of their coming into operation (the effective date).

Due to the date of its initiation, which was some months prior to the effective date of the new EIA regulations (on 3 July 2006), the EIA for the project remains subject to the requirements of the regime provided for by the ECA and the previous EIA regulations. This is because the new EIA regulations provide that "an application for authorisation of an activity submitted in terms of the previous regulations and which is pending when these Regulations take effect, must despite the repeal of the previous regulations be dispensed with in terms of the previous regulations as if the previous regulations were not repealed".<sup>2</sup>

While it would thus seem that the new EIA regulations are not relevant to the establishment of the project, it should be considered that the new EIA regulations were promulgated for a number of reasons, including a desire on the part of the national Department of Environmental Affairs and Tourism to streamline and rationalise the EIA process and to provide for a more fully elaborated legal framework against which EIA can be conducted. It is therefore possible that the framework provided by the new EIA regulations may be of some use in guiding the remainder of the process in the EIA for the project, or in shedding light on problematic issues that the administrative decision-maker, Bohlweki or Eskom may encounter. For these reasons and for completeness sake a summary of the process requirements of the new EIA regulations is included in this report at Table 1 (included in Appendix D). Table 1 (included in Appendix D) is so named to demonstrate the linkage between the information which it contains and the information appearing on Table 4.1 above, which deals with the ECA and the previous EIA regulations.

#### **4.2.2. Applicable convention, legislation and by-law**

Table 2 (included in Appendix E) of the first report provided information on national and provincial legislation potentially applicable to the establishment of the project. Two factors have suggested the need to extrapolate Table 2 (included in Appendix E) for the purposes of this report, namely:

- Bohlweki's instructions with regard to the need to include information on certain aviation-related law; and,

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<sup>1</sup> Regulations in terms of Chapter 5 of the National Environmental Management Act 107 of 1998, Environmental Impact Assessment Regulations, 2006, GNR 385, GG 28753 of 21 April 2006.

<sup>2</sup> *Ibid.*, Sub-regulation 84(1).

- the identification of the site for the project as being located at Olyvenhoutsdrift, within the //Khara Hais Local Municipality, Siyanda District Municipality (previously Upington Local Council).

As a result of these factors, and the need to provide Bohlweki with a more user-friendly set of environmental legal resources applicable to the EIA for the establishment of the project, Table 2 has now been divided into the following three, separate but related tables:

- Table 2A: Key International and Domestic Aviation legal requirements potentially applicable to the establishment of the proposed Concentrating Solar Power Plant (including Annexure 1 to Table 2A) (included in Appendix F);
- Table 2B: Key National and Provincial Environmental legislation potentially applicable to the establishment of the proposed Concentrating Solar Power Plant (Table 2B is the previous Table 2);
- Table 2C: Municipal By-law potentially applicable to the establishment of the proposed Concentrating Solar Power Plant.

The following limitations apply to the abovementioned tables:

- Table 2A: This table complies with Bohlweki's instruction to IMBEWU that this report should include reference to relevant aviation-related law due to the site identified for the location of the project being in the proximity of an airfield. Bohlweki's further instruction was that the actual location of the project will be outside the airfield's "danger zone". With this instruction in mind IMBEWU conducted certain, limited desktop research into the relevant law. Our findings from this research are that certain national legislation and international convention is potentially applicable to the project. We have therefore constructed the separate Table 2A to deal with this legislation and convention. It should be noted that the information contained on Table 2A emerges from an area that is not among IMBEWU's areas of expertise. Table 2A deals with aviation-related legislation and convention whereas IMBEWU's specialist area of expertise is South African environmental law and process. While our research, in response to Bohlweki's abovementioned instruction, seems to indicate that the information on Table 2A is both accurate and applicable to the project, IMBEWU can provide no warranty in this regard. Table 2A is therefore provided as a courtesy to Bohlweki and is meant to guide future consideration of those aspects of the project impacted by legal requirements found in aviation-related legislation and convention. Bohlweki is advised to recommend to Eskom that Eskom approach the South African Civil Aviation Authority for guidance on the matters dealt with on Table 2A, prior to the commencement of construction of the project. Table 2A is included in Appendix F.

- Table 2B: IMBEWU has not been instructed with new information, other than that mentioned above, e.g., that appearing in the Briefing Paper (March 2006), in regard to specific actions contemplated for the establishment of the project. Such specific actions might include, e.g., clearing of vegetation, building of roads, installation of powerlines, digging of borrow-pits or emissions to air/water. For this reason it has not been possible to update the information on Table 2 of the first report. **In order to accord with the format for this report, described above, Table 2 of the first report has now been renamed Table 2B. As no changes have been made to the information contained on Table 2B, and in order to avoid confusion this table has not been provided to Bohlweki in this phase of IMBEWU's reporting on the project.** It is anticipated that Table 2B will be updated and amended and provided to Bohlweki, for inclusion in Bohlweki's final report on the EIA for the establishment of the project, during the first quarter of 2007. As anticipated above, such amendment and updating will require IMBEWU's being instructed with more detail on specific actions associated with the establishment of the project. IMBEWU now invites Bohlweki to provide such instruction.
- Table 2C: As abovementioned IMBEWU is instructed that the project is to be located at the "Olyvenhoutsdrift" site. IMBEWU has established that this site is within the jurisdiction of the "///Khara Hais" Local Municipality and the "Siyanda" District Municipality (previously Upington Local Council). Bohlweki might be aware that South African municipal by-law is currently in the process of renovation, with each municipality being responsible for the renovation on its own set of by-laws. This process is necessary due to the fact that many of the country's by-laws are either outdated or, having been promulgated prior to 1994, do not accord with the current constitutional dispensation. Some municipalities have taken the lead in this process and a number of renovated sets of municipal by-law have been promulgated. IMBEWU remains abreast of such developments and has access to a web-based database of new municipal by-laws, which are easily downloadable. Matters are more difficult when one is dealing with municipalities that have not, yet, renovated their by-laws. In such instances the best approach to identifying the applicable by-laws is personally to interact with relevant officials within the municipality, to seek their advice on what the set of by-laws may consist of and to request copies, usually hard copies, of such by-laws. In conducting the desktop research required to identify and report on by-laws potentially applicable to the project we were unable to identify, on the abovementioned web-based database, a set of renovated by-laws for to the "///Khara Hais" Local Municipality. It was therefore reasonable to assume that the process of renovation of by-laws has not been undertaken by the "///Khara Hais" Local Municipality, and we consequently made telephonic contact with the Siyanda District Municipality

(formerly Upington Local Council) on 14 December 2006 in order to make enquires in regard to accessing the relevant by-laws. During the course of this telephonic contact we were advised that the best source of information on relevant by-laws is the “//Khara Hais” Local Municipality electrical engineer, one Mr. Jake Nakoo. Upon trying to contact Mr Nakoo we were informed that he is currently on leave and will return to his post in early 2007. No other assistance has been forthcoming in our efforts to identify relevant by-laws and it is recommended that we attempt to contact Mr. Nakoo in early 2007 in this regard. Consequently Table 2C is currently unpopulated and we have not provided Table 2C to Bohlweki at this stage of our reporting.

#### **4.3. Conclusion**

The substantive content of this report is contained in the abovementioned Tables. Please now, therefore, refer to such Tables for information provided in this phase of IMBEWU’s reporting on the establishment of the project.